& Receiver General, 209 Mass. 373, 95 N. E. 851; *Matter of Cruger*, 54 App. Div. 405, 66 N. Y. Supp. 636, aff'd, 166 N. Y. 602, 59 N. E. 1121. It may be argued that the construction of the statute in the last-cited cases was unsound. See *Matter of Keeney*, 194 N. Y. 281, 286–287, 87 N. E. 428, 429. But if these cases are to be followed, *Matter of Wing* seems wrong, for it is obviously immaterial, under the statute, whether the gift by its terms takes effect "at" or "after" the donor's death.

TRUSTS — CONSTRUCTIVE TRUST — RIGHT OF ASSIGNEE OF FRAUDULENT GRANTEE, WITH NOTICE, TO EQUITABLE RELIEF. — The plaintiff took an assignment of E's rights as entryman upon public lands, with knowledge of E's fraud in obtaining those rights. The government not having set aside the entry during the statutory two-year period, nor contested it judicially thereafter, the plaintiff asserts his legal right to a patent, giving him title (1918 U. S. COMP. STAT. § 5113), and seeks to have a constructive trust imposed upon the defendant, to whom in the meantime the patent had been improperly issued. The latter resists on the ground that the plaintiff does not come into equity with clean hands. *Held*, that the trust be imposed, and that the defendant convey to the plaintiff. *Everett* v. *Wallin*, 184 N. W. 958 (Minn.).

For a discussion of the principles involved, see NOTES, *supra*, p. 754.

BOOK REVIEWS

OUTLINES OF HISTORICAL JURISPRUDENCE. By Sir Paul Vinogradoff. Volume I. Introduction: Tribal Law. New York: Oxford University Press. 1920. pp. ix, 428.

Historical jurisprudence is a creature of the nineteenth century, which in law as in everything else is the "century of history." In the eighteenth century all writing and thinking about law presupposed philosophy. In the nineteenth century, more and more they came to rest on history, until the historical school became dominant in jurisprudence almost everywhere. Moreover the legal history of the last century had a different purpose from that of the past. The sketch of Roman legal history by Pomponius in the Digest is no more than a preface to a dogmatic outline of the law. The preface with which Gaius begins his exposition of the Twelve Tables expressly justifies a preliminary historical survey on rhetorical and philosophical grounds. Rhetorically an exordium was demanded. Philosophically the ideal exposition must include history because a thing is perfect only when complete in all its parts and the beginning is an essential part. The legal history of Cujas was a Humanist reconstruction of classical antiquity, not an attempt to find universal principles or even general principles by means of history and make them the basis of a theory of the nature or the authority or the development of law. The historical research of Conring sought only the negative result of removing the basis of authority on which law had rested, in order that it might rest for the future upon a philosophical foundation. English writing of legal history before the nineteenth century had the immediate practical purpose of demonstrating the immemorial antiquity of the common law as the custom of Englishmen and thus setting up a basis of authority for the legal order. Fortescue sought to show that England had been governed by the same customs since pre-Roman Britain. Coke sought to make out the case of the common-law courts against the Stuart kings by finding the immemorial common-law rights of Englishmen, merely declared by Magna Charta, by a long succession of statutes, and by a long and continuous succession of judicial decisions. Hale also begins with the propo-

sition that the origins of English legal precepts are undiscoverable. Blackstone, in an age of philosophical science of law, adopts the theory of immemorial custom but regards that custom as declaratory of a law of nature, conformity whereto gives it its ultimate validity.

Nineteenth-century study of legal history was for a radically different purpose. History replaced philosophy as in the sixteenth century philosophy had replaced authority. The unchallengeable basis of the legal order was to be found not in the authority of Justinian nor in the authority of immemorial antiquity, not in conformity to principles of reason derived from the nature of man, but in universal principles of law or of growth or progress of law discovered by human experience of administering justice and human experience of intercourse in civilized society. Thus in one aspect the theory of law became historical. But in another aspect it became metaphysical. For the universal principles discovered by history were conceived to be realizings of an idea which was unfolding in human experience and in the development of institutions. History and metaphysics were complementary. The former discovered, the latter demonstrated; or, if one preferred, the latter demonstrated, and the former verified.

Down to the last century the science of law had but one method. From the twelfth to the sixteenth century jurisprudence is logical and its method is one of interpretation. For the rest philosophical theology is relied upon to bolster up the authority of the precepts that are interpreted. In the seventeenth and eighteenth centuries it is creative and its method is rational. In the nineteenth century it is systematic. It seeks to organize and systematize, whether by principles derived analytically from the legal materials themselves, or by principles derived historically from the legal materials by study of their development, or by principles derived metaphysically. Thus historical jurisprudence was one of three forms of the science of law in the last century, each of which for a time conceived of itself as possessed of the one sound method and as the whole of jurisprudence.

To Savigny law was a realizing of Kant's formula of justice. To the first phase of his school historical jurisprudence was the discovery through historical research of an ethical idea of individual freedom as right and of the manifestations of this idea as realized in human experience of the administration of justice and given form by jurist and judge and lawmaker. To Maine it was essentially the same. A more concrete political idea had already been put in place of the ethical idea. Maine conceived the realization of this idea concretely as a progress from status to contract and employed a comparative historical research to the extent of investigating the beginnings of legal institutions among Aryan peoples. Admitting that "Ancient Law" shows the influence of Savigny, Vinogradoff emphasizes the nationalist character of Savigny's school and on this basis claims a break with Savigny in Maine's later writings. But is it a break with Savigny or a carrying him forward? Note Vinogradoff's own words. He speaks (p. 140) of Maine's seeking "to impress on his readers the idea of a constantly recurring combination . . . produced by an undeveloped sense of individual right and natural union among the members of a village settlement." In other words, the idea of freedom realizing itself in an undeveloped sense of right is manifest in a constantly recurring combination. We have here the idealistic interpretation as we find it, for instance, in Puchta. What Maine did, besides putting the process of realization concretely, was to seek an Aryan basis in place of a nationalist basis. He sought for the realizations of the idea in the experience of Aryan peoples, not in the experience of this or that people of today. The real break is between Maine and Vinogradoff and is nothing less than the break which divides twentieth-century from nineteenth-century jurisprudence. In place of the simple idea of freedom,

giving us, as Vinogradoff shows, an interpretation of all law in terms of the individualistic society of the immediate past, and in place of the complex idea with a growing content (civilization) which Kohler had put in its stead, he finds as it were a series of ideas in social organization, which may be connected ultimately, perhaps, by philosophy or social science, but for jurisprudence stand as the foundations of successive types of legal order. Legal history is chronological. Historical jurisprudence is ideological. But it is not tied to one idea. There are "ideal lines." There is no universal ideal line. When the metaphysical foundation of the nineteenth-century historical school gave way, the attempt to provide a broader basis through a comparative method led some to positivism. It led others to a neo-Hegelian social-philosophical jurisprudence. It has led Vinogradoff to an idealistic pluralism.

To Vinogradoff, then, historical jurisprudence is the construction of a series of theories of law on the basis of historical types. With respect to each type there are two points of view. On the one hand there is a static point of view. Rules and institutions are to be considered "in a state of logical coherence and harmony" and an "equilibrium between conflicting tendencies" is to be sought by putting some claims as normal and others as exceptional. On the other hand there is a dynamic point of view because "ideas are mobile entities, passing through various stages — indistinct beginnings, gradual differentiation struggles and compromises, growth and decay" (p. 160).

All thinking about law has struggled to reconcile the conflicting demands of the need of stability and of the need of change. The legal order must be both stable and flexible. The social interest in the general security leads us to seek some fixed basis for an absolute ordering of human action whereby to assure a firm and stable social order. Continual changes in the circumstances of human life demand continual adjustments to the pressure of other social interests as well as to new modes of endangering security. The problem has been to unify or reconcile stability and change; to make the legal order appear something fixed and settled and beyond question, while at the same time allowing adaptation to the exigencies of infinite and variable human demands. The solutions thus far have run along three main lines, authority, philosophy and history; the first and third reconciling them in terms of stability and the second reconciling them in terms of change. Thus Vinogradoff's reconciliation of them in terms of a succession of historical types, with historically discoverable fixed lines of development within each type, is significant. In this, as in other respects, the book is representative of twentieth-century juristic thought. Its theory is relativist. Instead of universal ideas we have ideas valid for their type of society; just as Stammler thinks of the social ideal of the time and place, and so of natural law with a changing content, or Kohler of the jural postulates of the civilization of the time and place and a continually changing civilization.

Vinogradoff recognizes creative juristic activity (p. 4), which was taboo to nineteenth-century legal science, while at the same time taking account of the conditions of activity and consequent limitations thereon, which were ignored by the eighteenth century. "Law," as he aptly puts it, "is intended to be a direction of conduct, but in its actual application is a compromise between intentions and circumstances" (Preface). Again, in contrast with the historical school of the past, he recognizes plurality of causation (p. 180) and rejects the conception of a single solving method or formula or theory. He sees "collisions of interests," not conflict of wills (p. 97). He thinks of law as the "product of compromises and agreements which assume the technical shape of rights" (p.151). He takes account of physical factors in his exposition of social institutions (p. 166). He does not attempt to trace one normal and continuous line of evolution (p. 167). He insists on the complexity of primitive culture, and does not look for a universal idea in primitive institutions as was done so commonly a generation ago under the influence of the biological analogy of

embryology (p. 188). His whole conception of the scope and method of historical jurisprudence is modern and in happy contrast with what we have had from British writers on jurisprudence in the recent past. If there were nothing else, these things would make the book most welcome, since disinclination to read foreign languages has held back Anglo-American legal science much too long.

If we may infer from certain hints, the plan of the work involves a monumental undertaking. Apparently the first volume comprises the introduction and a consideration of two of the six types which will be taken up in the complete work. A second volume on the "jurisprudence of the Greek City," which is promised for early publication, may or may not complete the treatment of the third type. Even then with the two volumes no more than a beginning will have been made. For the fourth, fifth and sixth types are those with which we are immediately concerned today. We are seeking to satisfy human demands in a society of the sixth type, or at least shifting thereto, with legal materials that have come to us from, or that were fashioned in, societies of the fourth and fifth types. All that goes before these is but making straight the way for the real tasks of any theory of law.

In the Introduction there are two parts, entitled respectively "Law and the Sciences" and "Methods and Schools of Jurisprudence." It seems to be the purpose of the first part to show that jurisprudence is necessarily connected with and dependent upon other sciences, something which English analytical jurists of the last century were prone to deny. Accordingly successive chapters are devoted to "Law and Logic," "Law and Psychology," "Law and Social Science" and "Law and Political Theory." In the first, after pointing out that we must study things as they are, to which analytical jurisprudence sought to confine us, and also as we want them to be, in which alone the eighteenth-century philosophical jurisprudence took an interest, he takes up the *rôle* of logic in law and considers the guarantees of good reasoning through rules of pleading, rules of evidence and canons or methods of interpretation. Undoubtedly the latter function, and are meant to function, as guarantees of good reasoning. Taking interpretation for what it is, not what it purports to be, such guarantees are demanded to maintain the general security. But it must be remembered that the processes of subsumption, generalization and dogmatic construction, as they go on in legal interpretation, are logical in the modern sense that they involve coherent thought. They are not necessarily nor are they actually logical in the older sense of formal logic, that is, of drawing out of legal materials by an exact mechanical process a content which was already there. On the other hand guaranteeing of sound reasoning is the least significant function of rules of pleading. We are told that the rules under the Judicature Act have "loosened the hold of logic upon law" by removing "many of the firm pegs from which compelling deductions could be started" (p. 10). The "pegs" to-day are substantive legal rights, which had not been worked out in any detail when the rules of pleading arose. In the absence of a detailed system of legal rights, a detailed system of pleading served to hold tribunals to impersonal methods. With the development of an elaborate system of substantive law, rules of procedure are needed only to insure an orderly, dignified and deliberate conduct of legal proceedings and to insure that litigants not only have an opportunity to make their own case fully and fairly but also be enabled to know what is urged against them and have reasonable opportunity to meet it. In reality the minute apparatus of substantive rules in the maturity of law affords many more firm pegs for logical deductions than the technical procedure of the strict law.

In connection with "dogmatic construction," the setting up of "complexes of mutually dependent rules" — which, by the way, is usually a putting of system into a mass of rules after the event and then building on the result — he

speaks incidentally of the so-called jurisprudence of conceptions in the last century and of Jhering's critique. But, he tells us, "English law, so conspicuous for its common sense and attention to practical needs, is probably less liable than any other to have its rules perverted by an excess of abstract dialectic" (p. 25). This has been asserted more than once by others. I doubt much, however, if the facts of English law bear it out. Usually the course of decision in the common-law courts has been compared with the doctrinal books of the Continent, which is not a fair comparison. Even so, one may vouch Sir William Erle's remarks about "strong decisions," rendered on logical compulsion in the face of "common sense and common convenience," the decisions on pleading in Meeson and Welsby that carried out legal logic to a point which excluded the merits of causes from judicial consideration, the tendency a generation ago to treat rules of evidence in the same way, the nice logical refinements as to possession and custody in the law of larceny and such cases as *Reg.* v. *Ashwell*,[1] the decisions as to tacking of encumbrances and the *tabula in naufragio*, in which, it has been said, the courts have exhibited a pride in coming to unhappy results under an appearance of logical compulsion, and a deal of what has been called "technical equity," as for example in applications of the doctrine of clogging the equity of redemption — one may vouch such things and many more like them to show that in its day the jurisprudence of conceptions flourished in England quite as much as anywhere else.

But the main point is that logic is an instrument — an instrument of organizing legal materials to make them "cognoscible" (as Bentham put it) and usable; an instrument of judicial interpretation and application to insure certainty and predicability in judicial action; an instrument of juristic and judicial and legislative creative activity to insure a due balance of stability and change in the finding and making of law. Logic as an instrument is the theme of the first chapter.

Under "Law and Psychology," Vinogradoff points out that the conception of will, which plays so large a part in the law, the doctrine of responsibility in criminal law, the theory and practice of penal treatment, and the questions as to the legal bearing of motives require us to draw upon psychology. It is possible to go much further. Wigmore has shown how much psychology is involved in the law of evidence. And passing to wider problems of jurisprudence one might point out the importance of psychology in study of the nature and basis of the interests which the legal order seeks to secure; the relation of psychology to the process of judicial and juristic reasoning and judicial decision, and especially the unconscious or subconscious elements in these processes and their relation to juridical method; the psychology of rationalizations of what one desires to do and its relation to "logical compulsion" to reach unhappy results; the psychology of repression and the resultant limitations of effective legal action. In fact this chapter no more than scratches the surface of one of the most significant phases of the legal science of to-day.

In the chapter "Law and Social Science" there is a review of Tarde's theory of imitation, a discussion of the dividing line between social science and psychology, and of social psychology, a review of sociology, a brief consideration of statistics, a discussion of the relation of history to social science bringing out the synthetic function of historical thought, a suggested classification of the social sciences and a review of economics. This chapter also is unsatisfying. The task it essays is too much for any but a master of the social sciences and the execution falls down between criticism of transitory phenomena incident to the development of any new subject and sketchy generalization. Thus, social psychology is judged by the large pretensions which some have made for it. When any new subject arose in the last three decades, in reaction

[1] 16 Cox C. C. 1 (1885).

from the water-tight-compartment learning of the nineteenth century it reached out ambitiously in all directions. Instead of merely trying out its ideas and methods in the no-man's-land about it, it sought to annex all that land and a hinterland of the domain of adjacent sciences. Social psychology only did for a time what all new methods or new organizations of knowledge have been doing. Under the reign of the water-tight-compartment science of the last century no other way of trying itself from the outside was possible. The review of sociology is inadequate even in view of the brief space allotted thereto. It does not get beyond the stage of "applying purposely one-sided theories to the investigation of society" and leaves the stage of unification of the social sciences out of account. The review of economics ends with a brief consideration of economic materialism and the economic interpretation of jurisprudence and of legal history. This is more a fulmination against Marxian socialism than a scientific examination of a juristic doctrine which has no necessary connection with any form of socialism and has obtained adherents among orthodox individualists. Undoubtedly the doctrine has been carried to extravagant lengths. But this is equally true of every interpretation of law that was urged in the last century.

On the other hand, the chapter on "Law and Political Theory" is admirable. Beginning with the thesis that political theory is "indissolubly connected with the operation of law" (p. 84), it takes up the interdependence of state and law, the nature of the state, the question whether the state is to be regarded juristically as person (corporation) or as relation, and the ends of politically organized society. "Law and the state are to that extent interdependent that it would be idle to derive one from the other" (p. 85). As to the interpretation of the state, whether as an embodiment of power or an organic growth or a "juridical arrangement," there are elements of truth in all these interpretations, "although the share to be assigned to each is bound to vary with the epoch and the country" (p. 86). Also, one might say, the validity of such interpretations must be considered with reference to their purposes. It is not necessary to choose once for all and for every purpose between the idea of state as corporation and state as relation. We may use both (p. 90). So as to the ends of political organization. It is more important in English-speaking countries to develop a conception of public law than to go on debating these questions in quest of an absolute and universal answer. We need to make better provision for juristic treatment of the "rights and duties of the various social organizations — municipal, ecclesiastical, professional, educational, literary, etc. — that have stepped in between the individual and the state" (p. 97). Two problems, he says in conclusion, depend upon co-operation between law and political theory — (1) The "relation of state and law to the individual," (2) the "relation of state and law to the various groups in which human solidarity finds expression" (p. 99). Insistence upon the latter point, and upon the need of a conception of public law in Anglo-American legal science which will enable us to deal effectively with such groups or organizations, is a contribution of the first importance.

Part two of the Introduction, "Methods and Schools of Jurisprudence" takes up successively Rationalists, Nationalists, Evolutionists, and Modern Tendencies in Jurisprudence. He considers that legal thinking has followed three main lines "growing out of actual changes in world politics," namely rationalism, romantic reaction, and evolution (p. 104). Rationalism was largely the result of irritation caused by obsolete feudalism (p. 124) and is the background of the utilitarian jurisprudence that has ruled in English law schools (p. 110). He says rightly that in the direction of his mind Austin belongs to the period of rationalistic enlightenment (p. 115). Accordingly he enters upon a critique of the analytical theory of the nature of law, of sanction and of sovereignty, as "rationalistic jurisprudence." Philosophically Austin professed

be a Benthamite. But so far as his method and system were concerned he might equally have been a Hegelian, discovering manifestations of an idea through analysis of legal rules and legal institutions in their matured forms. Indeed it is significant that the followers of Austin and the followers of Maine, following a hint of Maine himself, had no difficulty in the end in reconciling the respective methods and in regarding the two schools as complementary. One sought analytically in one field what the other sought historically in another field. The law which the analytical school regarded exclusively was but the culmination of a historical development to which the historical school gave exclusive attention. Each kept religiously within the limits of the legal materials. They agreed, for example, in denying any connection of jurisprudence with ethics.

Under Nationalism he considers the historical school built by Savigny against a background of disillusionment after the excesses of the French Revolution (p. 124). But was nationalism a necessary item or the distinctive item in the creed of that school? Savigny's nationalism did not lead him nor the main body of his adherents to reject the reception of Roman law nor to refrain from an attempt to constrain the modern law within historical Roman bounds and to hold it to historical Roman conceptions. His nationalist ideas were partly inherited from the Protestant jurist-theologians of the sixteenth century, reinforced by ideas derived from the rise of strong central governments in the sixteenth and seventeenth centuries. But for the most part it is an incident of the reaction from the juristic notions of the French Revolution. As against the abstract propositions of natural law expressed in algebraic formulas in the Declaration of the Rights of Man, he called for ideas drawn from the very depths of the nation. Like Burke, he protested against importing the abstract ideas and formulas of the French Revolution without ability to import along with them the situations of fact in and out of which they arose. Beyond this Savigny was a Romanist and his faith in the historically discovered Roman idea made his legal science quite as universal as that of the adherents of natural law. Only the Germanists, who sought to find the organizing and directing ideas for the law of western Europe exclusively in the old Germanic materials, were nationalists at bottom, and theirs was often more a racial than a national interpretation of jurisprudence. Savigny's criticism of the provisions of the French Civil Code as to prescriptive acquisition of movables because they were based on misconception of Roman law, and so violate historical continuity, although they declare what had been the customary law of the north of France, represents the attitude of his school toward all the practical problems of the science of law.

When we distinguish methods and schools in jurisprudence everything depends upon the purpose for which we classify. If we look chronologically at the development of legal science in the modern world, we may see a first stage in which there was a philosophico-theological basis of authority coupled with interpretation of authoritative precepts. In a second stage there is a philosophical basis of authority with a rationalist-philosophical critique of legal precepts and construction of new ones. In a third stage (the jurisprudence of the nineteenth century) some seek a metaphysical basis of authority and give us a logical critique of legal precepts by deduction therefrom; some find a historical basis of authority and give us an analytical-historical critique of legal precepts; some find a political basis of authority and give us a purely systematic analytical critique of legal precepts. In a fourth stage the tendency is to find a basis in social philosophy or in a social-philosophical history and give us a functional critique of legal precepts and a social-utilitarian creation of new ones. But these phenomena may be generalized in many other ways. One way is to generalize them on the basis of the philosophical presuppositions of writers, express or implied, as was done by the metaphysical jurists in the last century. Thus in Miller's Lectures on the Philosophy of Law jurists are appor-

tioned among the different philosophical schools of past and present and the utilitarian prologue to Austin's Jurisprudence is taken to be the significant thing. It is possible to generalize them with reference to the method of treating the chief problems of the legal order, whether they are treated philosophically (thus including the scholastic jurists, the law-of-nature school, the metaphysical jurists of the nineteenth century and the social-philosophical jurists of today in one category), historically, analytically by applying a systematic analysis to the materials of legal systems as they are, or sociologically. In such a view we look backward from the standpoint of the legal problems of today. Hence we see the science of law as it developed in the nineteenth century too minutely for purposes other than appraisal of its results in order to construct a science of law for the needs of today. It is quite as possible to look forward to the method of today through a study of the evolution of juristic science and to see as significant modes of thinking the creative rationalism of the seventeenth and eighteenth centuries (regarding the analytical jurists as a continuation of this type into the nineteenth century in which the creative element was lost), the systematizing and stabilizing Hegelian historicism of the fore part of the nineteenth century and the evolutionary theories of the latter part of that century. But in such a view we are too far from the things of moment for the lawyer as in the former we were too near them. We lose sight of the systematizing and stabilizing character of Austin's "necessary" principles without which "a system of law as evolved in a refined community" cannot be conceived. These supposed universal principles have the same function as the universal principles of the "nationalists," discovered by another method. They have the same function also as the universal laws of legal development discovered in a still different way by the positivist evolutionists. For theirs also was a systematizing and stabilizing theory. On the other hand the seventeenth and eighteenth-century law-of-nature theory was a creative theory. Again it is possible to generalize with reference to conceptions of the nature of law, whether as philosophically discovered right or reason, or as historically discovered principles of action or as analytically discovered principles of politically imposed ordering, or as a social product to be understood through some one or through the co-operation of all of the social sciences.

All of the foregoing, and many others that might be suggested, are but attempts to organize the phenomena of juristic thinking for some definite purpose and must be judged with reference to that purpose. The lawyer who is wrestling with the problems of the legal order here and now and the historian of social control from the beginnings of human society to the present cannot use the same measure. Vinogradoff's scheme must be judged with reference to a comprehensive survey of all the types of social organization and an ideological systematizing of the legal institutions and legal precepts of each. With that purpose before him, he sees that an idea of law as a rational product, an idea of law as something drawn from the depths of national life, and an idea of law as an organism may be set off and used to distinguish types of juristic thought.

A chapter on "Modern Tendencies in Jurisprudence" concludes the Introduction. In this chapter he discusses the critical attitude, the constructive point of view (with a good critique of Duguit, pp. 150-152), and the conception of law as a part of the whole process of social control (with a critique of Ehrlich, p. 152). Next he attacks the "general jurisprudence" of the analytical school, showing that so far from being universal it is but "an encyclopaedic survey of the juridical principles of individualistic society" (p. 155). Then, following a suggestion of Weber as to study of types of economic development (p. 156) he proposes an ideological study of types of society and of jurisprudence as related to those types. Six such types are distinguished: (1) Origins in totemic society, (2) tribal law, (3) civic law, *i.e.*, a "type of jurisprudence settled

by the social tie of the city-state" (p. 159), (4) medieval law in its combination as canon and feudal law, (5) individualistic jurisprudence, and (6) the beginnings of socialistic jurisprudence. The last four pages of this chapter deserve to be read and pondered thoroughly. They are a distinct contribution to the science of law.

We come now to the main structure. "Tribal Law," in which the origins in totemic society are treated incidentally, is the subject of the remainder of the volume. It is taken up in three parts and ten chapters, as follows: I, The Elements of the Family, (1) Selection of Mates, (2) The Mother and the Father, (3) Religion and Marriage; II, Aryan Culture, (4) Aryan Origins, (5) The Patriarchal Household, (6) The Joint Family, (7) Succession and Inheritance; III, Clan and Tribe, (8) The Organization of Kinship, (9) Land Tenure, (10) The Law of Tribal Federation. Here the wide learning and synthetic powers of the author have ample scope and combine to give us what from the jurist's standpoint is a classical treatise.

Some points of special interest must be noticed. The survey of tribal law begins and ends with a sociological emphasis: "Historical jurisprudence as well as sociology has to start from the axiom that man is a social animal, *i.e.*, that social intercourse is a necessary attribute of human nature" (p. 163); jurisprudence is historical and must be historical "in so far as it takes stock of the social conditions which call forth legal principles" (p. 368). Accordingly he does not seek to discover and lay out a single rigid scheme of development as the plan of evolution as it must inevitably have taken place. He emphasizes the effects of migration of customs, adaptation and imitation, which make the biological analogy of the development of an organism deceptive when applied to legal institutions. He insists also on the absence of sharp lines, which do not exist in nature but are put in by those who seek to understand nature as a means of comprehending the phenomena which they study. Instead of rigid groups we have types. Certain phenomena recur; certain leading themes, as it were, recur in legal thinking. "As in music, they are not stereotyped in their manifestations; they vary in the course of conflicts and harmonizing attempts, but they are not numerous and are therefore amenable to definite observation and to reflective estimates" (p. 369). The formulations of an analytical survey of primitive forms of marriage (pp. 211-212) and of land tenure (pp. 342-343) are also noteworthy.

In the chapter on Aryan Culture a much-mooted question is discussed with exceptional judgment. He says that the "central fact of Aryan culture is a patriarchal state of society" (p. 224). Traces of "matrilinear arrangements" among Aryan peoples are pre-Aryan. They are due to "contaminations arising from contact between an Aryan patriarchal people and primitive settlers, whose construction of the family was different" (p. 223). Undoubtedly we must construct an Aryan *Utrecht* with caution. "Between the Indians [*i.e.*, British India], Teutons, Celts, etc., there are differences in climate, geography, mixture of races, conquests and other conditions, and therefore their development is bound to proceed on different lines. We cannot expect identical results and we must always take into account special conditions of economic, geographical and political development. The significant fact is that in spite of profound differences in results, we do observe — especially in family law, and in succession and Real Property — principles and rules that are varieties of the same leading ideas" (p. 229).

Not the least important feature is the paragraph on "non-litigious custom" (pp. 368-369). In this brief discussion, deriving in part it is true from Ehrlich, he insists rightly that the proposition, often insisted upon in the last generation, that the judge precedes the law is true only in part. "It is not conflicts that initiate rules of legal observance, but the practices of everyday directed by the give and take considerations of reasonable intercourse and social co-operation.

Neither succession nor possession nor property nor contract started from direct legislation or from direct conflict [*i.e.*, litigation]. Succession has its roots in the necessary arrangements of the household on the death of its manager, property began with occupation, possession is reducible to *de facto* detention, the origins of contract go back to the customs of barter. Disputes as to right in primitive society are pre-eminently disputes as to the application of non-litigious custom" (p. 368). Hence the jurist must study the social conditions out of which non-litigious customs arose in the past and the social conditions out of which they still arise. For all the law is not in the books. He must also study the logical implications of the principles which he finds in the legal materials. He will find principles and conceptions, although the actual rules and doctrines and the actual practice of applying them will not be wholly rational nor entirely reducible to systematic simplicity. At this point philosophical method, which Vinogradoff slights, plays its part. The philosophical jurist sets up an ideal form of the existing type of society, an ideal form of the principles and conceptions found in the existing legal materials, an ideal conception of the end of the legal order, and these are employed both consciously and subconsciously in judicial finding and application of law as well as in legislation and juristic writing. In this admirable paragraph we have the real introduction to historical jurisprudence.

ROSCOE POUND.

A HAND BOOK OF PRACTICE UNDER THE CIVIL PRACTICE ACT OF NEW YORK. By Carlos C. Alden. New York: Baker, Voorhis & Co. 1921. pp. vi, 340.

Dean Alden of the Law Department of Buffalo University has here sought to present a hand book, primarily for the use of students, of the practice of New York, under the Civil Practice Act which became effective October 1, 1921. The book serves its acknowledged purpose, but, like all outlines of a new system of procedure, its use to the practitioner must be confined to its general suggestions. A change or readjustment of any method of practice immediately becomes the subject of interpretation. A text book which under such circumstances attempts to set forth the practice in detail soon becomes obsolete. The use, however, of this outline, should be helpful to the student. After familiarizing themselves with the general principles of the substantive law, most students regard with confusion the mechanics by which such principles are applied and rights established and enforced. Experience has shown the difficulty of teaching, academically, the technique of procedure. The solution of problems of actual practice, alone, instruct with any degree of thoroughness in the art of the practitioner. A well considered outline containing the organization of the courts, by whom, when and how remedies are employed, should, however, give to the student a general working knowledge of the subject. The usefulness of such a work, especially during a period of transition, is quite apparent.

The plan and scope of Dean Alden's work, as indicated in the table of contents, are limited to presenting in a simple, orderly and logical manner such an outline. The author points out that the present New York system of practice which became effective only last October is the result of a progressive development extending over a period of seventy-five years, and is based substantially upon the former Code of Civil Procedure in a re-arranged form. Into the first Code of Procedure of 1848 and those subsequently enacted, there gradually crept many provisions not procedural in character. By the readjustment, basic matters of civil practice are incorporated into the new "Civil Practice Act" which is supplemented by rules of court known as "Rules of Civil Practice," into which has been placed many of the details of practice heretofore contained